

THE NUCLEAR TERRORISM CONVENTION: WILL DETAINEES BE CLASSIFIED AS “ENEMY COMBATANTS” BY THE UNITED STATES?

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I. INTRODUCTION

As images of recent bombings in subways and buses in London on July 7, 2005 make their way across newspapers and news stations internationally, the international community relives the atrocious images of the attacks on New York’s World Trade Center and is reminded that the

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threat of terrorism has not vanished.¹ Ever since the terrorist attacks of September 11, 2001 on New York's World Trade Center, the possibility of future terrorist activities is a concern that all countries are faced with.²

In an attempt to halt future attacks, countries have enacted domestic legislation and international treaties. The United States government has done this by enacting the Authorization for Use of Military Force (hereinafter "AUMF"), which grants President Bush and the Executive Branch an unprecedented amount of power,³ which includes the ability to detain individuals for life terms.⁴ This practice, as well as other tactics regarding interrogation techniques and conditions at detention camps, has fueled recent criticism within the international community that the United States is violating international humanitarian law, including the Geneva Conventions,⁵ in its attempt to eliminate terrorism.⁶

The United Nations (hereinafter "UN") has also been in the process of creating ways to eliminate terror by drafting treaties to suppress the threat of international terrorism.⁷ One of these treaties, the International Convention for the Suppression of Acts of Nuclear Terrorism known as the Nuclear Terrorism Convention (hereinafter "NTC"),⁸ was recently adopted by the UN General Assembly, and the United States has voiced its desire to sign the NTC⁹ when it will be open for signature and ratification in September 2005.¹⁰ The goal of the NTC is to prevent terrorists from

1. Alan Cowell, *Bombings in London: Bombings; Subway and Bus Blasts in London kill at Least 37*, N.Y. TIMES, July 8, 2005.

2. See generally Mary H. Cooper, *Nuclear Proliferation and Terrorism: Can "rogue" states and terrorists acquire nuclear weapons?* THE CQ RESEARCHER, Apr. 2, 2004.

3. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) [hereinafter AUMF].

4. See *id.*; *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004).

5. Katharine Q. Seelye, *Threats and Responses: The Detainees; Guantanamo Bay Faces Sentences of Life as Permanent U.S. Prison*, N.Y. TIMES, Sept. 16, 2002.

6. Symposium, *The Status of Persons Held in Guantanamo Under International Humanitarian Law*, 2 J. INT'L CRIM. JUST. 96, 97 (2004) [hereinafter *The Status of Persons Held in Guantanamo*].

7. See G.A. Res. 51/210, ¶ 3, U.N. Doc. A/RES/51/210 (Dec. 17, 1996).

8. Int'l Convention for the Suppression of Acts of Nuclear Terrorism, Apr. 13, 2005, available at http://www.untreaty.un.org/English/Terrorism/English_18_15.pdf (last visited Mar. 17, 2006) [hereinafter NTC].

9. Press Release, State Dep't Documents, U.N. Gen. Assembly Adopts Nuclear Terrorism Treaty (Apr. 13, 2005) [hereinafter U.N. Gen. Assembly Adopts Nuclear Terrorism Treaty].

10. See Press Release, Gen. Assembly, Gen. Assembly Adopts Convention on Nuclear Terrorism; Will Open for Signature at Headquarters 14 September, U.N. Doc. GA/10340 (Apr. 13, 2005) [hereinafter Gen. Assembly Adopts Convention on Nuclear Terrorism].

gaining access to nuclear weapons.¹¹ Additionally, the NTC contains a provision dealing with the treatment of detainees.¹²

This comment will explore the impact and effectiveness of the NTC by comparing the United States' policy pertaining to the treatment of detainees to the text of the NTC. Part II will discuss the current problem with the treatment of detainees by the United States, focusing on Guantanamo Bay detention camp in Cuba and Abu Ghraib prison in Iraq. Part III will provide background information on international humanitarian law, focusing on the United States' classification of al-Qaeda and Taliban detainees as "enemy combatants." Additionally, Part III will discuss the development of the position taken by the United States' courts regarding their ability to exercise jurisdiction over detainees. Part IV focuses on the goals of the NTC and the likelihood of ratification. Part V will provide an in-depth analysis of Article 12 of the NTC pertaining to the treatment of detainees and the application of domestic and international law. Additionally, Part VI examines the effect of the United States' credibility by signing on to the NTC.

II. UNITED STATES' CURRENT TREATMENT OF PRISONERS AND DETAINEES

As numerous human rights groups continue to raise concerns about the United States' treatment of detainees¹³ at Guantanamo Bay in Cuba and in the detention camp at Abu Ghraib in Iraq, more information revealing human rights violations by the United States has surfaced.¹⁴ These criticisms include allegations of torture, cruelty and inhumane treatment of

11. *Id.*

12. NTC, *supra* note 8, art. 12.

13. Among human rights groups criticizing the U.S. include the U.S. Human Rights Network, Amnesty International, the Human Rights Watch, and the U.N. Commission on Human Rights. See Richard J. Wilson, *United States Detainees at Guantanamo Bay: The Inter-American Commission on Human Rights Responds to a "Legal Black Hole,"* 10-SPG HUM. RTS. 2 (2003); See also Press Release, U.N. Experts Address Concerns Regarding Guantanamo Bay Detainees, U.N. Doc. HR/ 4860 (June 23, 2005) [hereinafter Experts Address Concerns].

14. There have also been allegations of human rights violations within United States borders. One example is found within *U.S. v. Awadallah*, where Awadallah was detained and held for over twenty days in various locations throughout the United States in extremely poor conditions and practically tortured by FBI agents for possible connections with the attacks on New York's World Trade Centers. *U.S. v. Awadallah*, 202 F. Supp 2d 17, 20 (S.D.N.Y. 2002). Awadallah's legs, for instance, were shackled in irons and an agent "kicked his leg shackles and pulled him by the hair to force him to face an American flag." *Id.* at 24.

detainees, arbitrary detention, violations of detainees' rights to health, and their lack of due process rights.¹⁵

After the terrorist attacks on September 11, 2001, Congress passed a joint resolution titled Authorization for Use of Military Force (AUMF).¹⁶ The AUMF authorized the President:

to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.¹⁷

A. *Conditions at Guantanamo Bay in Cuba*

Pursuant to the AUMF, United States forces were sent to Afghanistan by the President in an attempt to break up the Taliban government, along with the terrorist network, al-Qaeda.¹⁸ Beginning in January 2002, United States forces started transferring individuals captured by the American military in Afghanistan to Guantanamo Bay.¹⁹

Presently, there are approximately five hundred and ten individuals detained in Guantanamo,²⁰ who have not received fundamental principles of due process.²¹ These violations arise, since they have yet to have a chance to "challenge their confinement, to object to the failure [of the United States] to recognize them as prisoners of war, to consult with legal counsel, or even to advance claims of mistaken capture or identity."²² Additionally, these detainees have only received limited rights to correspond with their families, and any visitation rights have been limited to diplomatic missions

15. Experts Address Concerns, *supra* note 13 ("Many of these allegations have come to light through declassified Government documents.").

16. AUMF, *supra* note 3.

17. *Id.* § 2(a).

18. *Gherebi v. Bush*, 374 F.3d 727, 728 (9th Cir. 2004). Initially, U.S. forces were sent to Afghanistan to wage a military operation, but this military operation has commonly been referred to as a "war" but never formally declared a war. *Id.*

19. *Id.* Guantanamo Bay is a United States naval base located in Cuba which the United States occupies pursuant to an indefinitely termed lease entered into by Theodore Roosevelt with the Cuban government in 1903. *Id.* at 728, 734 n.9.

20. Guantanamo: Pentagon Announces Release or Transfer of Eight Detainees, ASSOCIATED PRESS, July 21, 2005.

21. *Gherebi*, 374 F.3d at 728–29.

22. *Id.*

from the detainees' home countries and from the International Committee of the Red Cross.²³

In addition to there being claims of violations of due process,²⁴ there have also been allegations of violations of basic human rights.²⁵ The most profound abuse is the effect that the environment at Guantanamo Bay has had on the mental health of the detainees.²⁶ The conditions at Guantanamo have led numerous detainees to attempt suicide.²⁷ The most shocking abuse that has occurred at Guantanamo Bay is the interrogation of detainee Mohammed al-Qahtani, which lasted fifty days.²⁸ The interrogation routine that officers at Guantanamo Bay followed included a tag team of interrogators who would wake al-Qahtani up at four in the morning and sometimes interrogate him until midnight.²⁹ These techniques and the treatment of detainees have spawned United States criticism internationally, along with United States lawmakers.³⁰

23. Wilson, *supra* note 13.

24. *Id.* (These allegations of due process violations include no access to counsel or to courts, no charges officially brought against these detainees, and the authorization by President Bush to allow "the detention and trial by military commission of any current or former member of the al-Qaeda organization.").

25. Experts Address Concerns, *supra* note 13. These violations include releases of pictures taken by the press depicting the arrival of detainees at Guantanamo Bay shackled and wearing blackened goggles. Wilson, *supra* note 13. Additionally, the interrogation techniques employed by the U.S. soldiers have come under attack, including certain procedures known as "stress and duress" which are condemned by many international bodies as cruel and inhumane treatment. *Id.*

26. Carlotta Gall & Neil A. Lewis, *Threats and Responses: Captives; Tales of Despair from Guantanamo*, N.Y. TIMES, June 17, 2003.

27. *Id.* These conditions center on the uncertainty of the detainees' future including when and if they will be released, detention in very small cells, isolation from other detainees, and the allowance of only one one-minute shower per week. *Id.*; See also Neil A. Lewis, *Red Cross Criticizes Indefinite Detention in Guantanamo Bay*, N.Y. TIMES, Oct. 10, 2003, at A1 (discussing reports by human rights groups regarding 21 detainees who because of their unknown fate at Guantanamo, have attempted 32 suicides in 18 months).

28. Adam Zagorin & Michael Duffy, *Inside the Interrogation of Detainee 063*, TIME, June 20, 2005. The interrogation and treatment of Mohammed al-Qahtani was uncovered by "an 84-page secret interrogation log obtained by Time." *Id.*

29. The officers also employed techniques such as "Fear Up/Harsh," "Pride/Ego Down," the "Futility Approach" and the "Circumstantial Evidence Theme," all in attempts to weaken the detainees into giving a forced confession. *Id.*

30. Additionally, former President Jimmy Carter has urged Washington officials to close down Guantanamo Bay, along with President George W. Bush stating that his Administration was researching other alternatives to Guantanamo Bay. *Id.*

B. Conditions at Abu Ghraib prison in Iraq

The discovery of atrocious violations of international humanitarian law by the United States at the detention camp Abu Ghraib occurred when pictures of naked Iraqi prisoners surfaced in international newspapers and magazines.³¹ These pictures taken by United States soldiers depicted naked Iraqi prisoners, whose heads were covered by hoods, being forced to simulate sexual conduct as United States soldiers posed in the pictures.³²

Abu Ghraib prison was established during Saddam Hussein's (hereinafter "Saddam") regime, which imprisoned thousands of criminals [and political prisoners] "who were subjected to unspeakable torture at the whim of" Iraqi soldiers.³³ Additionally, each cell contained a large hook that was used by Iraqi soldiers to hang inmates from either their feet or their hands.³⁴ The Bush Administration invaded Iraq in March of 2003,³⁵ ostensibly because of the unacceptable practices of the Saddam dictatorship.³⁶ However, United States soldiers have used the same hooks as used by Saddam to hang Iraqi detainees, practicing the same behavior that was used by Saddam which was so atrocious that necessitated the invasion of Iraq by the United States.³⁷

III. THE UNITED STATES POLICY REGARDING DETAINEES: CLASSIFICATION OF "ENEMY COMBATANTS"

The detention of individuals at Guantanamo Bay has become the cornerstone for criticism of the United States' position on "human rights and international humanitarian law in its 'war on terrorism.'"³⁸ International humanitarian law is comprised of the four 1949 Geneva

31. Johanna McGeary, *The Scandal's Growing Stain*, TIME, May 17, 2004.

32. Iraqi prisoner Haider Sabbar Abed al-Abbadi recounts to a *Time* reporter the horrible evening when U.S. soldiers forced detainees to perform sexual acts while U.S. soldiers took pictures. *Id.* According to al-Abbadi, "he was told to masturbate, though he was too scared to do more than pretend, as a female soldier flaunted her bare breasts". *Id.*

33. *Id.*

34. *Id.*

35. Hassan M. Fattah, *The Struggle for Iraq: The Tally; Civilian Toll in Iraq Is Placed at Nearly 25,000*, N.Y. TIMES, July 20, 2005.

36. McGeary, *supra* note 31.

37. Waleed Sabih al-Delami was detained at Abu Ghraib by U.S. officials and tells a TIME reporter that U.S. officials "suspended [him] from such a hook three times during his five-month stint in U.S. custody" and his feet were tied and his arms were bound behind his back as U.S. officials shouted at him: "You are a terrorist! You are a terrorist!" *Id.*

38. *The Status of Persons Held in Guantanamo*, *supra* note 6 at 97.

Conventions and two 1977 Additional Protocols.³⁹ When an individual is detained during an international armed conflict, he is classified as either a combatant or a civilian.⁴⁰ If an individual is classified as a combatant, he will receive protection as a prisoner of war (POW) under the Third Geneva Convention and if an individual is a civilian, the Fourth Geneva Convention protects him.⁴¹ President Bush and his Administration have placed these detainees within a “legal black hole”⁴² by failing to classify Taliban and al-Qaeda detainees as either combatants or civilians,⁴³ but rather classifying these detainees as “unlawful combatants”⁴⁴ or “enemy combatants.”⁴⁵

A. *The Geneva Conventions*

In order for an individual to receive treatment as a POW under the Third Geneva Convention, the country that the detainee is from and the detaining country must be a party to the Geneva Convention.⁴⁶ Article 4 of the Third Geneva Convention states that POWs are persons who have been detained by the enemy and must fit into a classification delineated therein.⁴⁷ Paragraph 1 of Article 4 provides that POW status will be granted to “[m]embers of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed

39. *Id.* at 98; The four Geneva Conventions include: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

40. *The Status of Persons Held in Guantanamo*, *supra* note 6, at 100.

41. *Id.*

42. Wilson, *supra* note 13. The term “legal black hole” references the status of the detainees at Guantanamo Bay. *Id.* The U.S. claims that the Third and Fourth Geneva Conventions do not apply to them, thereby, placing these detainees without the protections of international humanitarian law. *Id.*

43. Ari Fleischer, White House Press Sec’y, Statement on the Geneva Convention (May 7, 2003), available at <http://www.whitehouse.gov/news/releases/2003/05/20030507-18.html> (last visited Sept. 30, 2005); *The Status of Persons Held in Guantanamo*, *supra* note 6, at 100.

44. *The Status of Persons Held in Guantanamo*, *supra* note 6, at 100.

45. *Gherebi*, 374 F.3d at 728.

46. Third Geneva Convention, *supra* note 39, art. 2 (“In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”); see also Fleischer, *supra* note 43.

47. Third Geneva Convention, *supra* note 39, art. 4.

forces.”⁴⁸ Additionally, pursuant to Paragraph 2, the definition of POW includes “[m]embers of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements” as long as one of the following conditions is met:

- a) That of being commanded by a person responsible for his subordinates;
- b) That of having a fixed distinctive sign recognizable at a distance;
- c) That of carrying arms openly;
- d) That of conducting their operations in accordance with the laws and customs of war.⁴⁹

The Third Geneva Convention provides additional protection in Article 5 which states:

[s]hould any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.⁵⁰

1. *Treatment of al-Qaeda detainees*

The Bush Administration explicitly states that the Geneva Conventions do not apply to al-Qaeda detainees, because they are an international terrorist group and are not a party to the Geneva Conventions.⁵¹ No dispute has arisen to this position taken by the Bush Administration.⁵² Therefore, al-Qaeda detainees are not afforded any protections or rights of the Geneva Conventions, nor are they granted POW status.⁵³

48. *Id.* art. 4, para. 1.

49. *Id.* art. 4, para. 2.

50. *Id.* art. 5.

51. Fleischer, *supra* note 43.

52. *In Re Guantanamo Detainee Cases*, 355 F. Supp 2d 443, 478 (D.C. Cir. 2005) (Clearly, al-Qaeda is not a contracting party to the Geneva Conventions, members of al-Qaeda are not afforded any protections of the treaties).

53. Fleischer, *supra* note 43.

2. Treatment of Taliban detainees

The Bush Administration's position is that prior to a detainee receiving POW status and treatment, four conditions must be satisfied:

- 1) "[T]hey would have to be part of a military hierarchy;"
- 2) "[T]hey would have to have worn uniforms or other distinctive signs visible at a distance;"
- 3) "[T]hey would have to have carried arms openly;" and
- 4) "[T]hey would have to have conducted their military operations in accordance with the laws and customs of war."⁵⁴

The Bush Administration clearly stated that the Third Geneva Convention will apply to Taliban detainees, since Afghanistan is a party to the Geneva Convention, even though the United States does not recognize the Taliban as the legitimate government, rather, as the de facto government.⁵⁵ However, the Administration, in its May 7, 2003 Statement by the Press Secretary on the Geneva Convention, reasoned that POW status would not be granted to Taliban detainees irrespective of the fact that the Geneva Conventions would apply to them.⁵⁶ The administration asserted that the Taliban detainees have not met the four pre-conditions necessary for an individual to be granted POW status pursuant to Article 4 of the Third Geneva Convention.⁵⁷ The Administration did not make this decision based on an individualized determination; rather, its decision was based on a generalized grouping of all Taliban detainees without analyzing specific situations.⁵⁸

Subsequently, the Administration's initial policy that the Geneva Conventions apply to Taliban detainees without the protections afforded to POWs was overruled in *In re Guantanamo Detainee Cases*.⁵⁹ The court held that the President could not "rule by fiat that an entire group of fighters covered by the Third Geneva Convention falls outside of the Article 4 definitions of 'prisoners of war.'"⁶⁰ Since the President cannot make a

54. *Id.*

55. *Id.*

56. See *infra* text accompanying note 57 (discussing the pre-conditions to POW status).

57. The Administration concludes that Taliban detainees have not sufficiently distinguished themselves from the civilian population because they have not worn uniforms or other distinguishing items and that they have not conducted their military operations in accordance with the laws and customs of war since they have "knowingly adopted and provided support to the unlawful terrorist objectives of the al-Qaeda." Fleischer, *supra* note 43.

58. *Guantanamo Detainee Cases*, 355 F. Supp 2d at 479–480.

59. *Id.* at 480.

60. *Id.*

broad characterization that these detainees are not POWs,⁶¹ doubt has arisen as to their status. According to Article 5 of the Third Geneva Convention, these individuals should receive protections of the present Geneva Convention until a competent tribunal determines their status.⁶² The United States has violated the Geneva Convention by failing to establish a competent tribunal to determine the status of the Taliban detainees.⁶³

B. Status as "enemy combatants"

The Bush Administration has classified al-Qaeda and Taliban detainees as "enemy combatants" and imprisoned these individuals pursuant to the AUMF since its inception in 2001.⁶⁴ However, this term was not formally defined until July 7, 2004, when the Combatant Status Review Tribunal (CSRT) was created.⁶⁵ The definition of "enemy combatant" from that Order is as follows:

[T]he term "enemy combatant" shall mean an individual who was part of or supporting Taliban or al Qaeda [sic] forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.⁶⁶

The United States government's position is that once an individual has been classified as an "enemy combatant," that individual "can be held indefinitely until the end of America's war on terrorism or until the military determines on a case by case basis that the particular detainee no longer poses a threat to the United States or its allies."⁶⁷ The United States government has suggested that due to the uncertain duration of the war on

61. *Id.*

62. Third Geneva Convention, *supra* note 39, art. 5.

63. Even though some of the detainees filing habeas corpus petitions were granted proceedings to determine if they were "enemy combatants" pursuant to the Combatant Status Review Tribunal (CSRT), these proceedings were inadequate pursuant to Article 5 of the Third Geneva Convention because there is no evidence that the CSRT made specific findings to determine whether the detainees are POWs. *Guantanamo Detainee Cases*, 355 F. Supp 2d at 480; *see also infra* notes 160–168 and accompanying text (discussing the inadequacies with the CSRT).

64. *Guantanamo Detainee Cases*, 355 F. Supp 2d at 474.

65. Paul Wolfowitz, U.S. Deputy Sec'y of Defense, Memorandum on Order Establishing Combatant Status of Review Tribunal to the Sec'y of the Navy (July 7, 2004), <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>. (last visited Sept. 29, 2005) [hereinafter Wolfowitz Memorandum].

66. *Id.*

67. *Guantanamo Detainee Cases*, 355 F. Supp 2d at 447.

terror, it is possible that these detainees could be incarcerated for life terms.⁶⁸ It has been a long, complicated battle for detainees at Guantanamo Bay to gain access to the United States courts to challenge their detention.

1. *Challenging “enemy combatant” status for detainees at Guantanamo Bay*

Prior to the Supreme Court decision of *Rasul v. Bush*⁶⁹ in 2004, individuals detained at Guantanamo Bay had no way to challenge their classification as an “enemy combatant,” because the United States courts claimed that they did not have jurisdiction to hear these cases.⁷⁰ The Supreme Court distinguished the situation pertaining to the detainees at Guantanamo Bay from the detainees in *Johnson v. Eisentrager*,⁷¹ who were German detainees held in China, where the United States Supreme Court held that there was no jurisdiction to hear their *habeas corpus* petitions.⁷² The United States can exercise jurisdiction over a detainee if the United States has sovereignty over the territory or if there is territorial jurisdiction.⁷³ The distinguishing factor, which gives the United States jurisdiction to hear *habeas corpus* petitions filed by Guantanamo Bay detainees, is that the United States exercises “complete” territorial jurisdiction and control of the naval base in Cuba due to the express terms of the lease agreement the United States has with Cuba.⁷⁴

In finding that the United States courts have jurisdiction to hear habeas corpus petitions from detainees at Guantanamo Bay,⁷⁵ United States courts later determined that detainees held as enemy combatants at Guantanamo Bay are granted protections of the due process clause.⁷⁶ Specifically, the Court of Appeals for the Ninth Circuit stated in *Gherebi* that the

68. *Hamdi*, 124 S. Ct. at 2641.

69. *Rasul v. Bush*, 124 S. Ct. 2686, 2687 (2004).

70. *Id.* at 2687, 2691.

71. *Id.* at 2693.

72. *Johnson v. Eisentrager*, 339 U.S. 763, 765, 781 (1950).

73. *Gherebi*, 374 F.3d at 734, 738.

74. *Rasul*, 124 S. Ct. at 2693 n.72, 2696; *see also supra* note 19. The lease entered into between the U.S. and Cuba “cedes to the U.S. ‘complete jurisdiction and control’ over the Base, it recognizes the ‘continuance of ultimate sovereignty’ in Cuba.” *Gherebi*, 374 F.3d at 734 (citing Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations, Feb. 16–23, 1903, U.S.–Cuba, T.S. 418 art. III).

75. *Rasul*, 124 S. Ct. at 2696, 2698.

76. *See Gherebi*, 374 F.3d at 731 (holding that unlawful detainees were still afforded due process rights and that the Judicial Branch could not allow the Executive Branch to detain foreign citizens without allowing them any access to courts or access to counsel); *See also Guantanamo Detainee Cases*, 355 F. Supp 2d at 464 (recognizing the detainees rights under the due process clause of the Fifth Amendment).

government's treatment of the detainees at Guantanamo Bay by failing to allow them access to the United States courts "is inconsistent with fundamental tenets of American jurisprudence and raises most serious concerns under international law."⁷⁷

After the *Rasul* decision, a July 7, 2004 Order issued by Deputy Secretary of Defense Paul Wolfowitz created the CSRT to review the status of each enemy combatant.⁷⁸ However, the United States District Court for the District of Columbia in *In re Guantanamo Detainee Cases* held that the procedures utilized by the CSRT did not meet the requirements of the Fifth Amendment due process clause.⁷⁹ The court explained that under the due process clause, each individual detained on the basis that he is an "enemy combatant" must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker.⁸⁰ The deficiencies within the CSRT's procedures include their extensive reliance on classified information in its determination of enemy combatant classification, their failure to allow the detainees to review the classified information, and their prohibition against the assistance of counsel.⁸¹ All of these inadequacies within the CSRT "deprive the detainees of sufficient notice of the factual bases [sic] for their detention and deny them a fair opportunity to challenge their incarceration."⁸²

Even though the court in *In re Guantanamo Detainee Cases* held that the failure of the CSRT to allow the detainees counsel and the inability of the detainees to view the classified information relied on by the CSRT in determining their status as enemy combatants was deficient,⁸³ the CSRT has

77. *Gherebi*, 374 F.3d at 731.

78. Wolfowitz Memorandum, *supra* note 65. The CSRT was created after the *Hamdi v. Rumsfeld* decision which held that detainees at Guantanamo Bay have the right to access to counsel and the right to due process. *Hamdi*, 124 S. Ct. at 2650–52. The Combatant Status Review Tribunal (CSRT) was established to make sure that the detainees were afforded due process. *Guantanamo Bay Detainee Cases*, 355 F. Supp 2d at 467. More specifically, the CSRT provides a procedure where detainees have the right to hear the factual basis for their detention and they have the right to testify as to why they should not be considered an enemy combatant. *Id.* at 450.

79. *Guantanamo Detainee Cases*, 355 F. Supp 2d at 468. The due process clause of the Fifth Amendment of the United States Constitution states that no person shall "be deprived of life, liberty, or property, without due process of law". U.S. CONST. amend. V.

80. *Guantanamo Detainee Cases*, 355 F. Supp 2d at 467 (citing *Hamdi*, 124 S. Ct. at 2648).

81. *Id.* at 472.

82. *Id.*

83. *Id.*

not modified its procedures.⁸⁴ The CSRT still does not allow the assistance of counsel; rather, it allows detainees to receive assistance from a military officer,⁸⁵ which the court in *In re Guantanamo Detainee Cases* held violated the due process clause.⁸⁶ Additionally, the CSRT still denies detainees access to classified material,⁸⁷ even though this procedure was deemed insufficient to support “a constitutionally permissible basis for the indefinite detention of the” detainees.⁸⁸

2. Challenging “enemy combatant” status for detainees held at Abu Ghraib in Iraq

The explicit terms of the lease that the United States has with Cuba, pertaining to Guantanamo Bay, grant the United States courts jurisdiction to hear claims made by the detainees held there.⁸⁹ However, detainees held as enemy combatants at Abu Ghraib in Iraq and other regions, cannot challenge their status within the United States courts unless the United States is a sovereign over that territory or exercises exclusive territorial jurisdiction.⁹⁰

The basis of the United States jurisdiction lies within the “potentially” permanent duration of the United States’ presence in the other country.⁹¹ The United States does not have the intent to remain permanently in Iraq, since the United States government has been discussing pulling United States troops from Iraq.⁹² Since the United States presence in Iraq is not permanent, the United States does not have jurisdiction to hear habeas corpus petitions filed by detainees in Iraq.⁹³

Additionally, the CSRT does not apply to detainees held as enemy combatants at detention centers other than Guantanamo Bay.⁹⁴ The Order

84. Rear Admiral James M. McGarrah, Director of Administrative Review of the Detention of Enemy Combatants, Dep’t of the Navy, *Detainees: Hearing on Detainees Before the S. Comm. on the Judiciary, 109th Cong.* (2005) [hereinafter McGarrah Hearing].

85. *Id.*

86. *Guantanamo Detainee Cases*, 355 F. Supp 2d at 472.

87. McGarrah Hearing, *supra* note 84.

88. *Guantanamo Detainee Cases*, 355 F. Supp 2d at 470 n.34.

89. *Gherebi*, 374 F.3d at 734 n.9.

90. *Id.* at 733–34; The U.S. Supreme Court, in *Johnson v. Eisentrager*, recognized that alien enemies held outside the territorial jurisdiction of the U.S. could not bring habeas corpus petitions in U.S. courts. *Eisentrager*, 339 U.S. at 778.

91. *Gherebi*, 374 F.3d at 734.

92. David E. Sanger & Eric Schmitt, *Washington Memo: Hot Topic: How U.S. Might Disengage in Iraq*, N.Y. TIMES, Jan. 10, 2005.

93. *Gherebi*, 374 F.3d at 734.

94. Wolfowitz Memorandum, *supra* note 65.

creating the CSRT explicitly states that the CSRT only applies to detainees at Guantanamo Bay.⁹⁵ If these detainees are not covered by the Geneva Conventions, which they will not be if they are part of a terrorist regime,⁹⁶ the detainees are left with no option to challenge their possible life incarceration, unless the United States establishes a review board like the CSRT.

C. *Other International Doctrines affording detainees protection*

In addition to the protections afforded in the Geneva Conventions, other international and domestic law exist that grants detainees not covered by the Geneva Conventions some protections.⁹⁷ For example, United States Army Regulation 190-8, provides that "all persons taken into custody by United States forces will be provided with the protections of the [1949 Geneva Convention Relative to the Treatment of Prisoners of War] . . . until some other legal status is determined by competent authority."⁹⁸ Additionally, the International Covenant on Civil and Political Rights provides that "anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."⁹⁹ Even though the United States has established the CSRT, this tribunal is not competent, since the United States court held that those procedures still violate the detainees' due process rights.¹⁰⁰

IV. THE NUCLEAR TERRORISM CONVENTION (NTC)

A. *Background of NTC*

On April 13, 2005, the United Nations General Assembly adopted the International Convention for the Suppression of Acts of Nuclear Terrorism,

95. *Id.*

96. Fleischer, *supra* note 43.

97. *Gherebi*, 374 F.3d at 731 n.7.

98. *U.S. Army Regulation 190-8, OPNAVINST 3461.6, AFJI 3461.6, MCO 3461.1*, ch. 1-5 para. a(2), in *ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERFERENCES & OTHER DETAINEES* (1997), available at <http://www.au.af.mil/au/awc/awcgate/law/ar190-8.pdf>. (last visited Mar. 17, 2006).

99. Int'l Covenant on Civil & Political Rights, art. 9, para. 4, Dec. 16, 1966, 999 U.N.T.S.

171. Other international conventions pertaining to human rights includes the Vienna Convention on Consular Relations, the International Covenant on Civil and Political Rights, and the American Declaration of the Rights and Duties of Man. Wilson, *supra* note 13.

100. *Guantanamo Detainee Cases*, 355 F. Supp 2d at 472.

known as the NTC.¹⁰¹ The NTC is the first anti-terrorism convention adopted since the terrorist attacks of September 11, 2001 on New York's World Trade Center.¹⁰² Originally, the NTC was proposed by Russia in 1998 and resulted in seven years of drafting negotiations until its adoption by the UN General Assembly on April 13, 2005.¹⁰³ The NTC will be open for signature at the United Nations Headquarters in New York City from September 14, 2005 to December 31, 2006.¹⁰⁴

The goal behind the NTC is to improve the existing international anti-terrorism legal framework¹⁰⁵ "for international cooperation in the investigation, prosecution, and extradition of those who commit terrorist acts involving radioactive material or a nuclear device."¹⁰⁶

Article 2 defines the offenses of the NTC.¹⁰⁷ Article 2, Paragraphs 1 and 2 of the NTC makes it an offense for any person to possess, use, or threaten to use radioactive material with the intent to cause death or serious bodily injury or to cause substantial damage to property or the environment.¹⁰⁸ Paragraph 3 states that a person commits an offense if he attempts to possess or attempts to use radioactive material with the intent to cause death or serious bodily injury or to cause substantial damage to property or the environment.¹⁰⁹ Additionally, any person will have committed an offense under the NTC who participates as an accomplice, organizer, or director of another individual in violating Article 2 Paragraph 1, 2, or 3.¹¹⁰ Article 1 defines radioactive material as:

nuclear material and other radioactive substances which contain nuclides which undergo spontaneous disintegration (a process accompanied by emission of one or more types of ionizing radiation, such as alpha-, beta-, neutron particles and gamma rays) and which may, owing to their radiological or fissile

101. U.N. Gen. Assembly Adopts Nuclear Terrorism Treaty *supra* note 9; NTC, *supra* note 8.

102. U.N. Gen. Assembly Adopts Nuclear Terrorism Treaty *supra* note 9.

103. Press Release, Gen. Assembly, Ad Hoc Committee Adopts Draft Nuclear Terrorism Convention, Culmination of Negotiations Begun in 1998, U.N. Doc. L/3085 (Apr. 1, 2004) [hereinafter Ad Hoc Committee Adopts Draft Nuclear Terrorism Convention].

104. NTC, *supra* note 8, art. 24, para. 1.

105. Nicolas Michael, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, Press Briefing on Nuclear Terrorism Convention (Apr. 12, 2005), *available at* http://www.un.org/News/briefings/docs/2005/Legal_Counsel_Briefing_050412.doc.htm. (last visited Mar. 17, 2006).

106. U.N. Gen. Assembly Adopts Nuclear Terrorism Treaty *supra* note 9.

107. NTC, *supra* note 8, art. 2.

108. *Id.* art. 2, para. 1-2.

109. *Id.* art. 3, para. 3.

110. *Id.* art. 2, para. 4.

properties, cause death, serious bodily injury or substantial damage to property or to the environment.¹¹¹

Fears about possible nuclear terrorist attacks are real and imminent concerns faced by the international community.¹¹² These concerns were heightened when A.Q. Kahn, creator of Pakistan's nuclear bomb, admitted that he had operated "a busy black-market trade in centrifuges, blueprints for nuclear-weapons equipment to enrich uranium into weapons-grade fuel and missiles capable of delivering nuclear warheads."¹¹³ The most likely threat of a nuclear terrorist attack is by a weapon called a dirty bomb, which can be easily made with a radioactive material called cesium that is used in X-ray machines.¹¹⁴ Due to this increased risk of nuclear terrorism,¹¹⁵ it is likely that individuals will be detained for violations of the NTC once the treaty is ratified.

B. Countries' Reaction to NTC

The United States¹¹⁶ and approximately twenty other countries have expressed their desire to ratify the NTC.¹¹⁷ This indicates that the NTC will probably be ratified,¹¹⁸ since twenty-two countries are needed for ratification.¹¹⁹ Additionally, United Nations Secretary-General Kofi Annan has urged all States to become a party to the NTC.¹²⁰ Annan also stated that the adoption of the NTC "is a vital step forward in multilateral efforts to

111. *Id.* art. 1, para. 1.

112. Cooper, *supra* note 2 at 299.

113. *Id.*

114. *Id.* at 300.

115. *Id.* at 299; Additionally, the United Nations Secretary-General Kofi Annan states that "[n]uclear terrorism is one of the most urgent threats of our time." Press Release, Secretary-General Kofi Annan, Secretary-General Says Nuclear Terrorism Convention Adds Building Block to Global Anti-Terrorism Strategy, in Remarks to Ad Hoc Committee, U.N. Doc. SG/SM/9798 (Jan. 4, 2005).

116. Ad Hoc Committee Adopts Draft Nuclear Terrorism Convention, *supra* note 103. The United States is pleased that United Nations Member States have "demonstrated a seriousness of purpose and worked together in a multilateral setting to conclude" the Nuclear Terrorism Convention. *Id.*

117. Gen. Assembly Adopts Convention on Nuclear Terrorism, *supra* note 10. Some of the countries who have indicated their support of the NTC are India, Russia, Syria, Pakistan, and Mexico. *Id.*; Ad Hoc Committee Adopts Draft Nuclear Terrorism Convention, *supra* note 103.

118. Gen. Assembly Adopts Convention on Nuclear Terrorism, *supra* note 10.

119. NTC, *supra* note 8, art. 25; *see also* U.N. General Assembly Adopts Nuclear Terrorism Treaty, *supra* note 9.

120. Press Release, Secretary-General Kofi Annan, Secretary-General Congratulates General Assembly on Adoption of Int'l Convention on Nuclear Terrorism, U.N. Doc. SG/SM/9817 (Apr. 13, 2005).

prevent nuclear terrorism” and that “[t]he Convention will help prevent terrorist groups from gaining access to the most lethal weapons known to humanity.”¹²¹ Due to the large support of the NTC internationally, including that of the UN, the NTC will likely be ratified by the necessary twenty-two countries shortly after the opening of the signature date.

V. ARTICLE 12: WHAT LAW APPLIES TO DETAINEES
HELD IN VIOLATION OF THE NTC?

Article 12 addresses the treatment of detainees who are taken into custody for violation of Article 2 of the NTC.¹²² The addition of Article 12 in the NTC is interesting in the context of the international debate concerning current alleged violations of international law and human rights pertaining to the treatment of detainees.¹²³ Article 12 provides that:

Any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international law of human rights.¹²⁴

The text of Article 12 describes “fair treatment” as the enjoyment of all rights and guarantees as defined within two different sets of law: state law and international law.¹²⁵ However, the vague language of Article 12 makes it difficult to ascertain which state law and international law will apply to the treatment of detainees.¹²⁶ These ambiguities pose a serious problem as to the treatment of detainees who are held in violation of Article 2 in the determination of which law applies, and is increasingly important, since many people may be detained for violating Article 2 due to the increased threat of nuclear terrorism.¹²⁷

121. *Id.*

122. NTC, *supra* note 8, art. 12.

123. *The Status of Persons Held in Guantanamo*, *supra* note 6, at 97.

124. NTC, *supra* note 8, art. 12.

125. *Id.*

126. *Id.*

127. See *supra* notes 112–115 and accompanying text (discussing the possibilities of a nuclear terrorist attack).

A. State Law and Article 12

First, the state law that will dictate what rights and guarantees that will be afforded to detainees is "the law of the State in the territory of which that person is present."¹²⁸ This appears to mean that the law of the detaining power will not apply, rather, the law of the territory where the detainee is held.¹²⁹ However, a reasonable interpretation exists that the domestic law of the country detaining the individual should apply. An issue as to what domestic law should apply may arise in a situation where United States troops have arrested an individual in Iraq for violating Article 2 and then detains him or her at Abu Ghraib. Thus, the question arises as to whether Iraq law or United States law applies.¹³⁰ One would argue that by strictly construing the language of Article 12, Iraq law applies, since that is the territory that the person is detained in.¹³¹ On the other hand, one could argue that United States law should apply since it is the detaining power.¹³²

Article 11 provides additional guidance as to which State Party's law would apply.¹³³ Prior to Article 11 being applied, the State Party must establish jurisdiction pursuant to Article 9 of the NTC.¹³⁴ Accordingly, a State Party can exercise jurisdiction if the offense committed was against a national of that State.¹³⁵ Therefore, if an offense was committed against a national of the United States in a region outside of the United States, the United States could exercise jurisdiction and would have to abide by Article 11.¹³⁶

Subsequently, Article 11 requires that the State Party exercising jurisdiction in the territory where the offender is present, whether or not the offence was committed in its territory, prosecute the case without undue

128. NTC, *supra* note 8, art. 2, 12.

129. *Id.*

130. *Id.* art. 12.

131. *Id.*

132. STEVEN C. WELSH, ESQ., NUCLEAR TERRORISM & DETAINEE POLICIES: INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF ACTS OF NUCLEAR TERRORISM (June 17, 2005), available at <http://www.cdi.org/news/law/ntc-detainees.cfm> (last visited Sept. 30, 2005).

133. NTC, *supra* note 8, art. 11; Article 11, Paragraph 1 in pertinent part states that "[t]he State Party in the territory of which the alleged offender is present shall, in cases to which article 9 applies ... be obliged ... to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State." *Id.* para. 1.

134. NTC, *supra* note 8, art. 9.

135. *Id.* art. 9, para. 2(a).

136. *Id.* art. 11.

delay according to that State Party's laws.¹³⁷ It can be inferred from the language of Article 11, that if a person is detained he will be guaranteed fair treatment according to the detaining State Party's domestic law if the State Party establishes jurisdiction.¹³⁸ If the detaining State Party does not establish jurisdiction, then, whichever State Party establishes jurisdiction will apply its domestic law.¹³⁹

If United States law were to apply, the determination of what rights that individual has is dependent on what territory he is located in.¹⁴⁰ If an individual is detained at Guantanamo Bay or within the United States, he would still be afforded due process rights.¹⁴¹ But, this does not mean that these individuals would be guaranteed fair treatment pursuant to Article 12.¹⁴² The United States government contends that it affords detainees fair treatment by not subjecting them to "physical or mental abuse or cruel treatment."¹⁴³ However, this statement is inconsistent with the many allegations of abuse that have led detainees to attempt suicide.¹⁴⁴ The inability of Article 12 to specify exactly what constitutes fair treatment,¹⁴⁵ similar to the United States position towards detainees at Guantanamo Bay, leaves this term open to subjective interpretation.¹⁴⁶

However, if a non-resident individual was detained for violation of the NTC in a region that the United States could not exercise jurisdiction over,¹⁴⁷ like Iraq, he is not afforded constitutional rights.¹⁴⁸ Additionally, if

137. *Id.* art.11, para. 1.

138. *Id.*

139. NTC, *supra* note 8, art.11, para. 1.

140. *See id.* art. 12 (discussing the issue of jurisdiction in relation to exclusive territorial jurisdiction and sovereignty).

141. *See Guantanamo Detainee Cases*, 355 F. Supp 2d at 464 (alien detainees held at Guantanamo Bay were afforded due process rights).

142. NTC, *supra* note 8, art. 12.

143. Press Release, Office of the Press Sec'y, Status of Detainees at Guantanamo (Feb. 7, 2002) [hereinafter Status of Detainees at Guantanamo], available at <http://www.whitehouse.gov/news/releases/2002/02/print/20020207-13.html> (last visited Sept. 30, 2005).

144. Gall, *supra* note 26; *see also* notes 24–30 and accompanying text.

145. Welsh, *supra* note 132.

146. Status of Detainees at Guantanamo, *supra* note 143; *see also* William J. Haynes II, General Counsel of the U.S. Dep't of Defense on Counter-Resistance Techniques, Memorandum to Sec'y of Defense (Nov. 27, 2002), available at <http://www.cdi.org/LAWS/haynes-counter-resistance-112702.pdf> (last visited Sept. 30, 2005). For example, General Counsel for the Department of Defense William J. Haynes II, in a memo to the Sec'y of Defense regarding interrogation practices at Guantanamo Bay, questioned why detainees could not be forced to stand longer than four hours a day since he stands for eight to ten hours a day during his workday. *Id.* Haynes completely neglected the reason that the detainees are forced to stand for prolonged periods of time is used as an interrogation tactic, not in the furtherance of their career. *Id.*

147. *See supra* text accompanying note 90.

an individual is classified as an enemy combatant, he would not be able to challenge his classification with the CSRT.¹⁴⁹ Even though he must be prosecuted without undue delay pursuant to Article 11,¹⁵⁰ this may not occur given that Guantanamo Bay detainees have been detained for years without official charges being brought against them.¹⁵¹

B. *International Law and Article 12*

The most ambiguous language of Article 12 is the phrase "applicable provisions of international law, including international law of human rights," since it fails to state what international law will apply.¹⁵² The reason that this phrase is so problematic is due to the position that the United States is taking in determining the status of detainees in Guantanamo Bay.¹⁵³ The problem that arose is the classification given to these detainees by the United States as unlawful combatants who were not afforded the protections of the Geneva Conventions.¹⁵⁴

Throughout the U.N. resolutions promulgated during the negotiation of the NTC, it is never specified as to what international law will apply.¹⁵⁵ Rather, the resolutions refer to international law by stating that the NTC will be in "accordance with the Charter of the United Nations and the relevant provisions of international law, including international standards of human rights . . ."¹⁵⁶ and in other portions of the Official Record refers to international humanitarian law.¹⁵⁷ However, during the drafting of the NTC, representatives from Egypt submitted a proposal to include the elements of international humanitarian law, but withdrew their proposal for fear that their proposal would extend negotiations.¹⁵⁸

148. *Eisentrager*, 839 U.S. at 768 (holding that German prisoners convicted in China for committing military activity against the United States had no constitutional rights and could not file a habeas corpus petition in the U.S. courts).

149. Wolfowitz Memorandum, *supra* note 65.

150. NTC, *supra* note 8, art. 11, para 1.

151. Wilson, *supra* note 13.

152. NTC, *supra* note 8, art. 12.

153. Fleischer, *supra* note 43.

154. *Id.*

155. See G.A. Res. 51/210, ¶ 3, U.N. Doc. A/RES/51/210 (Dec. 17, 1996); See also G.A. Res. 59/46, ¶¶ 3, 8, U.N. Doc. A/RES/59/46 (Dec. 16, 2004).

156. G.A. Res. 46, *supra* note 155, ¶ 3.

157. U.N. GAOR, 59th Sess., 91st plen. mtg. at 3, U.N. Doc. A/59/PV.91 (Apr. 13, 2005) [hereinafter U.N. Doc. A/59/PV.91] (Mr. Konuzin from the Russian Federation refers to international law by including the phrase "protection of human rights and respect for international humanitarian law.").

158. *Id.*

The unfortunate consequence of the ambiguous language of Article 12 is that it allows the United States and other countries the ability to apply the same policy the United States is currently implementing in its war on terror.¹⁵⁹ The individuals detained at Guantanamo Bay and Abu Ghraib have not been granted the protections of the Geneva Conventions or other doctrines of international humanitarian law, even though their incarceration may be for a life term; rather, the United States has created a loophole.¹⁶⁰ The end result of the loophole is that international humanitarian law does not apply to these detainees; rather, the United States has created its own international standards by establishing the CSRT,¹⁶¹ which only applies to detainees held at Guantanamo Bay.¹⁶² However, the procedures established by the CSRT have been deemed inadequate,¹⁶³ which places the detainees back to the beginning of their battle for freedom.

Additionally, the inadequacies of the CSRT are exhibited by Rear Admiral James M. McGarrah, the Director of Administrative Review of the Detention of Enemy Combatants', testimony to the United States Committee on the Judiciary on June 15, 2005.¹⁶⁴ McGarrah testifies that in less than six months all 558 detainees at Guantanamo Bay were granted hearings pursuant to CSRT to determine if they were properly classified as "enemy combatants."¹⁶⁵ Of those 558 hearings, only thirty-eight detainees were found to no longer meet "the criteria for enemy combatant designation."¹⁶⁶ This testimony creates an inference that no detainees were ever improperly classified as "enemy combatants," since McGarrah stated that they no longer meet the criteria,¹⁶⁷ indicating that at some point they did meet this criteria. The inadequacies with McGarrah's testimony are two-fold. First, it is hard to imagine that out of 558 detainees, not one was classified improperly as an "enemy combatant" due to the procedures established prior to the creation of the CSRT in determining detainees' classifications. Second, it is nearly impossible that in less than six months,

159. *The Status of Persons Held in Guantanamo*, *supra* note 6, at 102.

160. *See generally id.*

161. *Guantanamo Detainee Cases*, 355 F. Supp 2d at 450.

162. Wolfowitz Memorandum, *supra* note 65.

163. *Guantanamo Detainee Cases*, 355 F. Supp 2d at 468. The procedures employed by the "CSRT failed to provide any detainee with sufficient notice of the factual basis for which he is being detained and with a fair opportunity to rebut the government's evidence supporting the determination that he is an 'enemy combatant.'" *Id.* Additionally, the CSRT relied on classified information in making their determination that a detainee was an "enemy combatant", failing to provide the detainee with the same information and the assistance of counsel. *Id.*

164. *See McGarrah Hearing*, *supra* note 84.

165. *Id.*

166. *Id.*

167. *Id.*

the 558 hearings that were held could have been properly conducted to meet minimum due process requirements as established by *In re Guantanamo Detainee Cases*.¹⁶⁸

Just like detainees who are classified as "enemy combatants" by the United States in the "war on terror," individuals detained for violations of the NTC may also be classified as "enemy combatants," which would limit their ability to challenge their detainment. Pursuant to United States policy, if the United States arrested Taliban detainees for violation of Article 2, they would be afforded the protections of the Geneva Conventions.¹⁶⁹ Accordingly, if these Taliban detainees were classified as "enemy combatants," they could challenge their classification by claiming that they should be afforded POW status pursuant to the procedure explained in Article 5 of the Third Geneva Convention.¹⁷⁰

However, al-Qaeda detainees, as well as Taliban detainees who are not POWs, are left to challenge their enemy combatant status with the CSRT and the United States courts only if they are detained at Guantanamo Bay.¹⁷¹ Also, it is possible that the United States can claim that it is entitled to detain people in violation of the NTC for an indefinite period pursuant to the AUMF,¹⁷² even though these procedures and protections afforded by the CSRT have been deemed inadequate.¹⁷³

VI. EFFECT OF THE UNITED STATES SIGNING THE NTC

Once the United States signs the NTC, it would effectively agree to abide, "at least in principle," by all the articles of the treaties, including Article 12.¹⁷⁴ This would pose a problem to the United States, since it has created loopholes to avoid abiding with international humanitarian law.¹⁷⁵ Due to the ambiguous language of the NTC, the United States probably will conform with Article 12 if it maintains the same policies implemented presently. However, it appears that the international community will not

168. *Guantanamo Detainee Cases*, 355 F. Supp 2d at 472; see also *supra* notes 79–83 and accompanying text (discussing the procedures that the CSRT must follow in order for detainees to be granted their rights pursuant to the due process clause).

169. Fleischer, *supra* note 43.

170. Third Geneva Convention, *supra* note 39, art. 5.

171. Wolfowitz Memorandum, *supra* note 65.

172. AUMF, *supra* note 3.

173. *Guantanamo Detainee Cases*, 355 F. Supp 2d at 472 (holding that the procedures within the CSRT are inadequate for failure to provide counsel and allow detainees access to classified information used by the U.S. officials to determine "enemy combatant" status).

174. Welsh, *supra* note 132.

175. *The Status of Persons Held in Guantanamo*, *supra* note 6, at 98.

allow the United States to take this position for much longer.¹⁷⁶ It is hard to imagine that the intent of the drafters of the NTC was that individuals detained for violations of Article 2 would fall into a “legal black hole” in not receiving any protection of international humanitarian law. Also, it doesn’t appear that an indefinite detention is what the drafters meant when including the provisions of “international law of human rights.”¹⁷⁷

The United States’ credibility and reputation has deteriorated ever since human rights violations occurred at Guantanamo Bay and Abu Ghraib.¹⁷⁸ The United States lacks credibility, since its behavior in Iraq is hypocritical to its position as to why the United States invaded Iraq.¹⁷⁹ In order for the United States to attempt to improve its credibility and reputation within the international community, it is imperative that the United States change its position regarding the classification of detainees. Additionally, if the United States were to change its policy and the NTC were implemented, this would be a good way for the United States to regain trust from the international community.

VII. CONCLUSION

International terrorism is a real and imminent threat to the international community, especially the possibility of a nuclear attack. The NTC has great potential to create a legal framework to combat nuclear terrorism. However, this can only happen if the international community is closely connected. Due to the United States position on classifying detainees as enemy combatants, disdain has grown among leaders of countries, eliminating the possibilities of cooperation to combat terrorism. The United States can gain credibility by complying with international humanitarian law with the adoption of the NTC. Even though the language of the NTC is ambiguous, which allows the United States to continue to classify detainees as enemy combatants, the United States should abide by these international doctrines in order to provide for the fair treatment of detainees.

176. Wilson, *supra* note 13.

177. U.N. Doc. A/59/PV.91, *supra* note 157.

178. Specifically, the Ninth Circuit Court of Appeals has stated that the government’s position is “so extreme that it raises the gravest concerns under both American and international law.” *Gherebi*, 374 F.3d at 738.

179. McGearry, *supra* note 31; President George W. Bush’s convoluted rationales for invading Iraq include: the elimination of torture and the treatment of Iraqi prisons, including the Abu Ghraib prison, the liberation of Iraqis, and to find weapons of mass destruction. *Id.* Since it has been discovered that weapons of mass destruction do not exist in Iraq, the clear rationale to continue the occupation of Iraq is to liberate the Iraqi’s and eliminate torture and cruel and inhumane treatment at Iraqi prisons. *Id.* Quite to the contrary, the U.S. has maintained the same inhumane policies in Iraq, especially at Abu Ghraib, that Saddam Hussein’s dictatorship had implemented, eliminating any justification as to the justification for the U.S. invasion of Iraq. *Id.*